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No. 80-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the permit for the construction of a containment facility for dredged materials at Hart and Miller Islands in the Chesapeake Bay was properly issued pursuant to Section 10 of the Rivers and Harbors Act of 1899 or whether Congressional approval is required for such a facility pursuant to Section 9 of the Rivers and Harbors Act?

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OPINIONS BELOW — JURISDICTION — STATUTES INVOLVED

The opinions below have been properly identified by the Petitioners and this Respondent accepts the Petitioners

statement regarding jurisdiction and the recitals of the relevant statutes.

STATEMENT OF THE CASE

This Respondent is constrained to restate certain elements of the case because of Petitioners characterizations.

INTRODUCTION

Hart and Miller Islands at the time of the permit application in 1972 were privately owned islands which together with Pleasure Island at one time formed a peninsula reaching eastward into the Cheasapeake Bay from Baltimore County. During the past century the islands have eroded to the point where their acreage has dwindled from a total of 388 acres in 1849 to less than 127 acres today. If left alone the islands would disappear in less than 70 years.

The State of Maryland has proposed to construct a containment facility adjacent to these islands into which will be placed dredged materials from the Baltimore Harbor. Maintenance dredging of the channels in the Baltimore Harbor is of vital concern to the economic health of the Port of Baltimore and no large facility exists for the placement of this spoil. This proposed facility is an environmentally creative solution to a difficult problem.

The spoil containment project serves two primary purposes (1) the safe disposal within a defined perimeter thus preventing uncontrolled discharges into the Chesapeake Bay and (2) the restoration and future protection of the islands. The project involves the pumping of material into the enclosure where the sediments would settle and the supernatant water would slowly percolate through the bottom of the containment walls until a water level equilibrium is reached. Three sluice gates would be provided in order to prevent overtopping and washout

during the later periods of sediment disposal. Water which eventually would be discharged through the sluice gates will be treated if necessary to maintain water quality standards.

PERMIT PROCESS

The State of Maryland applied for a Section 10 (33 U.S.C. § 403) dredge and fill permit on February 25, 1972. This application triggered a federally coordinated review process including a complete environmental impact statement. On October 18, 1972 the Federal Water Pollution Control Act Amendments, 33 U.S.C. § 125 *et seq.*, were enacted into law. Section 404 of that Act required an additional and parallel Corps of Engineers permit for the discharge of the dredged spoil to a disposal site. The Section 404 and Section 10 permits were subsequently processed together requiring additional evaluation and duplicative hearings by the appropriate federal agencies. During the processing, the Corps of Engineers' official procedure dictated that both Section 10 and Section 404 permits applied to fill areas which did not span a navigable waterway, regardless of whether these areas were bulkheaded, diked or revetted (Court of appeals App. 133, 134). Furthermore, during this process, the Corps of Engineers determined that the subject project would *not* obstruct navigation but would have a beneficial effect since the disposal area would be utilized for the placement of dredged material from federal projects authorized by Congress to improve navigational channels in Baltimore Harbor. The containment area would not interfere with any navigable channel nor would it span a navigable waterway and its intrusion into the Cheaspeake Bay would be approximately 4,000 feet in an area where the Bay is approximately 7 miles wide.

This Respondent must correct certain misleading statements made in the Petitioner's section entitled "Factual Background".

The Hart and Miller Island facility is needed regardless of whether the Baltimore Harbor is ever dredged to 50 feet. There is no direct connection between the project and the proposals to take the Harbor depth to 50 feet.

The Corps did not seek the consent of Congress because such consent is not needed-not because of "political realities". The Corps has consistently held that projects such as this do not require Congressional authority.

If the islands have been used for recreational purposes it was without the owners approval or permission.

DISTRICT COURT PROCEEDING

This Respondent accepts the recital of the proceedings set forth by Petitioners, but states in addition the following.

The District Court curiously chose to follow the Second Circuit decision in *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970), *cert. denied Parker v. Citizens Committee for the Hudson Valley,* 400 U.S. 949 (1970), by applying the dictionary meaning to the term "dike", after it acknowledged the complex structure of Sections 9 and 10 (App. 40a). The Court also established an unworkable two tier regulatory pattern which would require a judicial determination that the "dike" constituted an obstruction to navigation before imposing the necessity of Congressional approval. This process would, given the application of the broad dictionary meaning, require a judicial determination for any "bulkheaded", "riprapped" or "diked" area that an obstruction exists before submission to Congress. The lower court also emphasized that Section 9 "applied to any dike *over* or *in* any navigable water", reasoning that the word "in" excluded structures which were within but also crossed a waterbody.

Respondents, moved for an immdiate rehearing and submitted a number of administrative materials, including a speech by Judge G. W. Koonce, the principal author of the 1899 legislation, as well as Congressional testimony of the Secretary of War in 1916. The motion for reconsideration was argued on November 17th. On November 22, 1978 the court denied reconsideration by written opinion, which did not treat the administrative and legislative materials.

FOURTH CIRCUIT PROCEEDING

The Court of Appeals determined that Section 9 of the Rivers and Harbors Act did not apply to this project. This holding recognized the intricate relationship between Sections 9 and 10 and the need to give meaning to these provisions by resorting to legislative history and the eighty years of Corps' administrative practice.

The Court reasoned that the predecessor statute, the 1890 Rivers and Harbors Act was designed to assert federal regulation over the obstructions to navigable waterways. Section 7 of that Act prohibited the construction of any obstruction without approval of the Secretary of War. Bridges, bridgedraws, bridge piers and abutments, causeways or other works over or in any navigable waters were prohibited even though authorized by a state legislature until the plans for such works were submitted and approved by the Secretary of War. Section 7 was transposed into §§ 9 and 10 during the 1899 recodification process. Section 9 differed from the language of the 1890 Act because congressional approval was required for the licensing of the listed structures which now included "dams" and "dikes". The Fourth Circuit concluded that the prevailing precedents in *United States v. Keokuk & H. Bridge Co.*, 45 F. 178 (S.D. Iowa 1890), *United States v. Rider,* 50 F. 406 (S.D. Ohio 1891), required Congressional approval in those situations where agency approval would have been an unconstitutional delegation in regard to

those structures which crossed navigable, interstate waterways. This legislative history was supported by the agency practice expressed by Judge G. W. Koonce in his lecture to the Company Officer's Class, Engineer School Fort Humphrey's Virginia on April 23, 1926, as reproduced in Hearings on Water Pollution Control Legislation — 1971 before the House Committee on Public Works, 92nd Cong., 1st Sess., Ser. 92-10, 284-291, at 288 (1971).

The record in this case shows a consistent interpretation by the Corps of Sections 9 and 10 for a period of over eighty years. In *Wisconsin v. Illinois,* 278 U.S. 367 (1929), this Court sanctioned reliance upon the Corps' administrative interpretation and administration of these provisions. Finally, the Corps' practice was reviewed by Congressional Conferees of the 1972 Water Pollution Control Act Amendments when adopting an overlapping dredge and fill regulatory framework. The Fourth Circuit noted that the expansive reading of Section 9 pursued by Petitioners could render Section 10 meaningless since structures listed there, such as jetties, breakwaters and fills would fall within Section 9 authority. The Court found that the Corps' management of the subject program presented a clear and workable relationship between the two sections.

ARGUMENT

THE FOURTH CIRCUIT DECISION IS CORRECT.

Petitioners contend that the Court of Appeals decision contained "the veneer of careful analysis" because it (1) determined that the relationship between §§ 9 and 10 was not clear on its face and (2) therefore did not apply the dictionary definition of a "dike". Their rational is too facile. The veneer of careful analysis of the Fourth Circuit decision reflects an acknowledgement by this Honorable Court in *Wisconsin v. Illinois, supra,* that the specific

provisions in question are intricate and in need of charification.

> "Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended. . . .
>
> The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.
>
> This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. . . .
>
> The practice is shown by the opinion of the Acting Attorney General, transmitted to the Secretary of War, 34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the Act. . . . The fact that the Secretary of War acted on this view was made known to Congress by many reports". 278 U.S. 367, 412-414 (Citations omitted).

A review of *Citizens Committee for the Hudson Valley v. Volpe, supra,* together with *Petterson v. Resor,* 331 F.

Supp. 1302 (D. Ore. 1971), *remanded as moot,* 494 F.2d 124 (9th Cir. 1974), *Sierra Club v. Morton,* 400 F. Supp. 610 (N.D. Cal. 1975), *aff'd in part, rev'd in part,* 610 F.2d 581 (9th Cir. 1979), *and Citizens Committee for Environmental Protection v. United States Coast Guard,* 456 F. Supp 101 (D.N.J. 1978) compels the conclusion that the recodification of the 1890 Act, and in particular the transformation of § 7 of the Act into §§ 9 and 10 of the 1899 Act, necessitate an indepth investigation of the legislative history.

Hudson Valley disregards the contemporaneous occurrences which surrounded this recodification. Numerous contemporaneous decisions cite the problems of bridges obstructing navigation over navigable waterways. See *Williamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1887), *Gilman v. Philadelphia,* 70 U.S. 713 (1866). Bridge building for railways and highways was heightened during this general time period because of the development of improved steel making processes by Bessemer. See generally, D. Jacobs and A. E. Neville, *Bridges, Canals and Tunnels: The Engineering Conquest of America* (1968).

When § 7 of the 1890 Act was transposed into § 9 certain parts of bridges, i.e. bridgepiers and bridgedraws, were no longer included within the category of bridges and causeways and in their stead were included the words "dike" and "dam". These additions were clearly intended to be within that class of structures which crossed a waterway and when placed within Section 9, Congressional approval was mandated for any of these structures placed on interstate streams.

The 1899 recodification also changed the general prohibitory language utilized for the authorization of *intra* state bridges, bridgedraws, bridgepiers and causeways. The 1899 recodificiation affirmatively granted state legislatures authority over the licensing of bridges, dams, dikes and causeways "across" waterbodies. The recodifier eliminated the same parts of bridges in the interstate provisions and in addition, because he changed the general prohibition to an affirmative grant of authority, he substituted the word "across" for the words "in" or "over". The categories of structures are identical. It is difficult to conclude that Congress would impose an inconsistent treatment for the same structures, giving the states authority over structures completely crossing a waterway, while reserving Congressional approval for marginal structures.[1]

HUDSON VALLEY DOES NOT PRESENT A REAL CONFLICT BETWEEN THE SECOND AND FOURTH CIRCUITS

The thrust of Petitioners case lies in the apparent conflict between the Second and Fourth Circuits Contrary to Petitioners implication (Pet. 13) no other circuit or district court has followed the Second Circuit decision (*Hudson-Valley, supra).*

By avoiding an indepth analysis, by focusing on one word and by presenting an unworkable regulatory

[1] This interpretation is supported by delegation by Congress of authority to various federal agencies to approve bridges, and dams in interstate navigable waters. See the General Bridge Act of 1946, 60 Stat. 847, 33 U.S.C., Section 525. See also, 49 U.S.C. 1651 (Department of Transportation).

framework stripping Section 10 of substance, *Hudson Valley* has become an anomaly. Furthermore, *Hudson Valley* was decided prior to passage of § 404 of the 1972 Water Pollution Control Act Amendments, which imposes a parallel permit requirement for the disposition of dredged spoil. An examination beneath the so-called "veneer of careful analysis" of the Fourth Circuit decision contrasted with the superficial, unforeseeing affirmance by the Second Circuit requires adherence to the reasoning of the Fourth Circuit. Petitioners themselves note the new impetus for the placement of dredged spoil into containment areas as refleted in the adoption of the 1977 Clean Water Act, Publ. L. No. 95-217, 91 Stat. 1566, 1577-78 (1977). The legislative history reviewed by the Fourth Circuit attributable to this most recent and parallel enactment forecloses all further question. The Corps has adhered to its practice of regulating marginal structures pursuant to Section 10 and those structures which span or cross a navigable interstate waterbody under Section 9. Their constancy has provided a degree of permanency to present and future applicants. Contrary to Petitioners' exhortations (Pet. 17), before authorizing Section 10 projects, the Corps must make an affirmative finding that such project does not obstruct navigation within that waterbody.

The Second Circuit in *Hudson Valley* spent very little time considering the Section 9 and 10 problem-in fact they considered the entire situation in one paragraph and adopted the District Court's opinion. 425 F.2d at 106. A review of the District Court opinion, *Citizens' Committee for the Hudson Valley v. Volpe,* 302 F. Supp. 1083 (S.D.N.Y) 1969) reveals that it is distinguishable both factually and legally. The District Court said:

> "In the absence of any legislative or judicial authority to support the defendants' theory of statutory inter-

pretation we apply ordinary meaning to the term 'any dike'" *Id.* at 1089.

Thus, the District Court is saying that since it has no legislative history it must look to the dictionary definition of the word "dike". Presumably had it had legislative history it would not have found it necessary to go to the dictionary. Every case since *Hudson Valley* has had the benefit of legislative and administrative history and every case has found in favor of respondent's position. The most recent case was a decision by the Northern District of California, *Sierra Club, et al. v. Leslie Salt Company, et al.* (N.D. Cal. No. C-72-561-WTS, January 15, 1980). This case was decided before the Fourth Circuit rendered its opinion in *Hart and Miller Islands.*

Furthermore, the District Court case in *Hudson Valley* is factually distinguishable since the Court found the proposed construction would substantially affect navigation. There is no such finding in this case and in fact the Corps found to the contrary. The *Hudson Valley* case is an anomaly, is distinguishable and has not been followed by any Court.

CONCLUSION

The only argument that the Petitioners have as to why the Supreme Court should grant certiorari is that there is a split among the Circuits. However, an analysis of the cases shows this is not true. All cases since 1970 which have considered the question have decided the issue the same way as the Fourth Circuit in this case. The only case going the other way is *Hudson Valley* and for the reasons stated above that case no longer has any vitality.

For these reasons and for all the other reasons stated above, Respondent urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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